

IN THE
SUPREME COURT OF THE UNITED STATES D

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

October Term, 1977

No. **77-762**

FRANK L. RIZZO, et al,
REDEVELOPMENT AUTHORITY OF THE
CITY OF PHILADELPHIA, Petitioners

v.

RESIDENT ADVISORY BOARD, et al, Respondents

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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**TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED
STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED
STATES SUPREME COURT:**

The Petitioner, the Redevelopment Authority of the City of Philadelphia, respectfully prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 31, 1977.

OPINIONS BELOW

The opinions of the Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania appear in a separately bound Appendix.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the decisions by the United States Supreme Court in the cases of *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, require a finding of racially discriminatory intent in order to establish a violation of Title VIII of the Civil Rights Act of 1968?

II. Does a local Redevelopment Authority make homes "unavailable" within the meaning of §3604(a) of Title VIII of the Civil Rights Act of 1968 by condemning homes occupied by black residents?

STATEMENT OF THE CASE

This action was commenced by respondents against several governmental defendants and a local community organization for the alleged breach of the Civil Rights Act of 1866 and 1871, 42 U.S.C. §§1981, 1982, 1983, 1985 and 1986; the Civil Rights Act of 1964, 42 U.S.C. §2000d; Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq.; and also, the Fifth, Thirteenth, and Fourteenth Amendments to the United States Constitution and also seeks injunctive relief which would require the construction of the Whitman Townhouse Project, a low-income housing project. The class action respondents claim to represent "all low income minority persons residing in the City of Philadelphia, who, by virtue of their race, are unable to secure decent, safe and sanitary housing, outside of areas of minority concentration, and who would be eligible to reside in the Whitman Park Townhouse Project." Also joined as respondents are two organizations, the Resident Advisory Board and the Housing Task Force of the Urban Coalition, which claim to represent either public housing tenants themselves or act as advocates for those tenants. Those petitioners eventually held liable for Civil Rights violations are the City of Philadelphia ("City") and its Mayor; the Redevelopment Authority of the City of Philadelphia ("RDA"); the Philadelphia Housing Authority ("PHA") and the Department of Housing; and Urban Development ("HUD"). Multicon Construction Corporation ("MULTICON") the proposed builder of the Whitman Townhouse Project, and the Whitman Area Improvement Council ("WAIC") were defendants before the District Court but were ultimately absolved from claims that they had violated the Constitution or the Civil Rights statutes.

In 1956, PHA first entertained the idea that a low-income housing project should be built in a section of Philadelphia known as Whitman. After internal approvals were obtained, the actual site for the proposed housing

was acquired by PHA through condemnation in 1959 and 1960.

The RDA's initial involvement with the Whitman Townhouse Project was not until 1967 when, for purposes of reducing the market price at which that land could be sold to a private developer, a special congressional amendment authorized PHA to transfer title to the site to RDA. Shortly thereafter, Multicon was chosen as developer for the project and, in 1970, the RDA entered into a Redevelopment Agreement with Multicon. The Redevelopment Agreement conveyed title to the site to the developer and required the construction and completion of the townhouses within eighteen months. The Redevelopment Agreement further incorporated an Agreement of Sale previously entered into between Multicon and PHA under which the completed homes and land would be sold to PHA in accordance with a Turnkey Program.

Multicon began construction in the Spring of 1971 and almost immediately encountered opposition to its activities by local residents. The problems between the builder and residents opposed to the construction of the project mounted on succeeding days and eventually led to legal actions before the state courts. Even after the court suits had ended, various problems remained and, in approximately January of 1972, Multicon decided that it could not continue construction.

On June 22, 1972, the RDA declared Multicon in default of its Redevelopment Agreement for failure to complete construction of the homes within the contractually required time period.

This action, filed in 1971, was tried in the District Court over a fifty-seven day span without a jury. On November 5, 1976, the District Court entered its Order holding that RDA had violated the affirmative duty provision of 42 U.S.C. §3608(d) (5) and, also, had committed a breach of Title VIII of the Civil Rights Act of 1968. The District

Court specifically held that there had been no intent to discriminate by the RDA and, consequently, had not committed violations of any constitutional provisions. With regard to the Title VIII violation, the District Court concluded that despite the *Washington v. Davis* decision, Title VIII violations do not require a showing of discriminatory intent. The Court thus reasoned that since the project would be tenanted by a majority of black citizens, the RDA resolution ending Multicon's involvement as developer, had a "discriminatory effect" against blacks which had not been justified by a showing of compelling governmental interest.

Interestingly, however, the District Court did not ground its holding against RDA in its June 22, 1972 resolution alone. The District Court found it necessary to couple that resolution with RDA urban renewal activities, totally unrelated to the Project, at a site several blocks away from the location of the Whitman Townhouse Project. Thus linked, the District Court found the RDA had violated the Civil Rights Laws.

An appeal to the Third Circuit Court of Appeals again ended in judgment against the RDA, but upon somewhat different grounds. The Circuit Court did not consider whether RDA was subject to the affirmative duty obligations of 42 U.S.C. §3608(d)(5). The Court did decide that a *prima facie* Title VIII case under §3604(a) had been established against RDA since its actions had a discriminatory effect which had not been justified. Preliminary to this finding, the Circuit Court agreed with the District Court that Title VIII liability may rest upon a showing of discriminatory effect and need not be supported by proof of discriminatory intent.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court's decisions in *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.* leave unclarified, important questions concerning applicability of Title VIII of the Civil Rights Act of 1968.

Prior to the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 597 (1976), the prevailing view among the Circuit Courts was that non-intentional acts by governmental bodies which have an adverse racial effect upon blacks could constitute a violation of the Equal Protection Clause of the U.S. Constitution. However, the *Washington* decision made clear its disagreement with that prevailing view when it held that a disproportionate racial effect was not sufficient, by itself, to establish a constitutional violation of the Equal Protection Clause. Left unanswered by that decision was whether its reasoning extended beyond the constitutional amendment and was equally applicable to Title VIII of the Civil Rights Act of 1968.

The Supreme Court's opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, while presented with the specific issue of whether discriminatory effect alone is sufficient to cause a Title VIII violation, chose not to resolve this question in the setting of that case. In *Arlington Heights*, as in the instant matter, the courts had found that the actions of the local governmental body while not intentionally discriminatory, did have an adverse racial effect. Consequently, in light of *Washington v. Davis*, the Supreme Court dismissed the allegations of constitutional wrongdoing and remanded the case to the Seventh Circuit for consideration of plaintiff's Title VIII claims. This action by the Supreme Court caused the Third Circuit to conclude:

If the same "impact-plus" test governed Title VIII actions, consideration on remand of the §3604(a) claim would have been unnecessary and a waste of valuable judicial resources, factors which could not have been lost upon the Supreme Court. In remanding, rather than directing the dismissal of the *Arlington Heights* litigation, the Court at least implied that considerations other than those necessary for proof of equal protection violations must govern Title VIII claims.

(Slip opinion at 40.)

The recent activity by the Supreme Court in clarifying and defining for governmental bodies the constitutional and statutory protections afforded citizens in the Civil Rights area has followed a meticulously careful process. Abiding by well-established guidelines, the Court narrowed its focus in the *Washington* and *Arlington Heights* decisions upon the specifically raised issue dominating those cases. In *Washington*, for example, the Court's constitutional analysis precluded the need to consider that decision's implications for Title VIII. Likewise, it is submitted, the Court's order in *Arlington Heights* that plaintiff's Title VIII claims be remanded must not be interpreted as a decision on the merits of that claim, as reasoned by the Third Circuit. It is more likely that the Court wished the matter briefed and argued in the lower courts, and a decision rendered by those courts, prior to the submission of this issue to the Supreme Court.

Also to be considered along with the unanswered implications of *Washington* and *Arlington Heights* is this Court's footnote in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that:

We intimate no view as to whether, had the complaint alleged purposeful racial or ethnic discrimination, Metro-Act would have stated a claim under §804.

As a result of the lower court's attempts to interpret the implications of these Supreme Court decisions, a highly sensitive, emotional, and important segment of the law will remain unclarified. Governmental agencies are tainted with the accusation of violating individual civil rights without definitive judgment by this Court. It is probable that this question of whether Title VIII cases require proof of discriminatory intent will receive varying treatment by the lower courts. Indeed, already the Third Circuit has rejected the traditional "compelling interest" rationale, thereby deviating from the Seventh Circuit's opinion in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (Arlington Heights II), and has refused to adopt the "business necessity" test utilized in Title VII cases. Instead, the Third Circuit has developed its own test, namely:

A justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.

(Slip Opinion at 43)

Clearly, there is a pressing need for guidance from this Court on this issue of highest importance to governmental bodies throughout this country.

II. The Circuit Court's holding that RDA violated 42 U.S.C. §3604(a) was based on a novel question of law not addressed in the court below and, as phrased, may effectively prohibit the exercise of the power of eminent domain.

Essentially, three questions were raised and decided at the district court level. First, whether there existed a violation of the constitutional provision guaranteeing equal protection of the laws. Second, whether, 42 U.S.C. §3608 (d)(5) imposed an affirmative duty upon the governmental defendants to promote integration. Third, whether the actions of the respective defendants had a disproportionate racial effect thereby violating Title VIII.

With regard to RDA, the Circuit Court rested liability upon breach of a specific statutory provision, 42 U.S.C. §3604(a), holding that the RDA made unavailable or denied Whitman housing to members of the plaintiff class. While the question of discriminatory effect comprised an extensive part of trial, the specific applicability of §3604 (a) was not raised at trial or treated in the District Court's opinion. Consequently, RDA did not present its position on this decisive issue to the Circuit Court.

Additionally, as noted above, evidence at trial revealed that RDA urban renewal activities outside the site of the project resulted in the relocation of a small number of black families. Although the legitimacy of this condemnation was never challenged, both lower courts found it imperative that this evidence form part of its rationale that "the actions of . . . RDA in connection with urban renewal activities in Whitman have had a racially discriminatory impact" and "that the urban renewal activities of the defendants had the result of removing black families from the Whitman site . . . was sufficient to establish a *prima facie* case of discriminatory effect." (Slip Opinion at 44.)

The exercise of the eminent domain power by the RDA is carefully circumscribed by state statute. Neverthe-

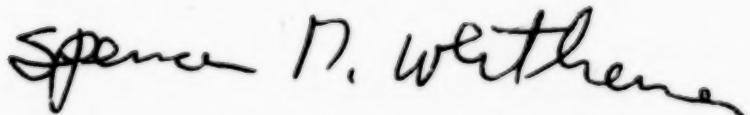
less, as a practical result, most condemnation activity in metropolitan areas affect blacks, and, in this sense, make homes unavailable. It is inconceivable that the District and Circuit Courts could have intended the result that must flow from their opinions; specifically, that no matter how necessary, the condemnation of properties housing blacks thereby making those homes "unavailable", may violate Title VIII.

The far-reaching consequences of the Circuit Court opinion demands review by the Supreme Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

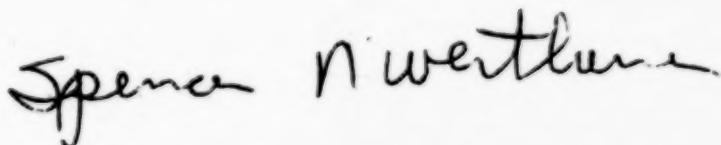
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 1977, three copies of the Petition for Writ of Certiorari were hand delivered to Jonathan M. Stein, Esquire, Sylvania House, Locust and South Juniper Streets, Philadelphia, Pennsylvania 19107 and Charles W. Bowser, 1845 Walnut Street, Suite 1300, Philadelphia, Pennsylvania 19103, Counsel for Respondents. I further certify that all parties required to be served have been served.



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